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THE METAMORPHOSIS OF THE FEDERAL NON-RESERVED WATER RIGHTS THEORY

Lisa Leckie O'Sullivan

Marjorie Borozan Thomas

I. INTRODUCTION

From an Associated Press story dated June 18, 1982:

Cheyenne, Wyo. (AP) Attorney General William French Smith renounced a broad federal claim to scarce water resources in the West on Thursday, reversing a Carter administration ruling that had angered those states affected.

Smith stated that Wyoming Attorney General Stephen Freudenthal had said recently that the Carter doctrine "creates a nightmare for Western states' water resources management." But Smith said, "I am here today to tell you and the nation that the nightmare is over."

The "nightmare" began in 1979 with the announcement by the Solicitor's Office of the Department of the Interior of the existence of federal "non-reserved" water rights. In an opinion¹ analyzing the nature and extent of non-Indian federal water rights for the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, Solicitor Leo Krulitz concluded that by the enactment of various land management statutes, "Congress authorized the United States to appropriate unappropriated water available on the public domain"² without regard to the substantive provisions of state law.³

On January 16, 1981, a Supplemental Opinion⁴ was issued by the new Solicitor, Clyde O. Martz. This opinion amended and modified the prior Krulitz opinion by concluding that neither the Federal Land Policy and Management Act of 1976 (FLPMA)⁵ nor the Taylor Grazing Act of 1976⁶ authorized the Bureau of Land Management to claim water rights under the broad "non-reserved" water rights theory.⁷ The National Park Service, Fish and Wildlife Service, and Bureau of Reclamation were not, however,

1. Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (1979).

2. 86 Interior Dec. at 615.

3. *Id.* at 577.

4. Supplement to Solicitor Opinion No. M-36915, on Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 88 Interior Dec. 253 (1981).

5. 43 U.S.C. §§ 1701-1782 (1976).

6. 43 U.S.C. §§ 315-316 (1976).

7. 88 Interior Dec. at 257-58.

included with the Bureau of Land Management and the door was left open for these agencies to assert the existence of a federal "non-reserved" water right.⁸

This door appeared to slam shut on September 11, 1981 when the current Solicitor, William H. Coldiron issued an opinion in which he concluded that "there is no federal 'non-reserved' water right."⁹ Solicitor Coldiron asserted that only the two traditional exceptions to the general policy of state control over water resources exist: the federal navigation servitude and the federal reserved right.¹⁰

In a recent legal memorandum¹¹ issued by the Department of Justice, the federal "non-reserved" water right asserted by Solicitor Krulitz was again shut out: "We conclude that the broad federal non-reserved water rights theory asserted by Solicitor Krulitz is not supported by an analysis of the applicable statutes and judicial decisions."¹² Nevertheless, Attorney General William French Smith and Assistant Attorney General Theodore B. Olson added that "we do not believe it is appropriate to reach a blanket conclusion that under existing federal statutes no implied federal water rights exist except for reserved rights."¹³

This comment will summarize, compare and contrast the opinions written by the three solicitors as well as the legal memorandum prepared by the Department of Justice and will discuss the legal consequences that follow.

II. THE KRULITZ OPINION

On June 25, 1979, Solicitor Krulitz issued an opinion¹⁴ to the Secretary of the Interior which discussed United States' water rights on federal lands administered by the Bureau of Land Management, the National Park Service, the Fish and Wildlife Service and the Bureau of Reclamation. The opinion was in compliance with President Carter's Water Policy directive of June 6, 1978, to "expeditiously identify, establish and quantify [the Department of the Interior's] non-Indian federal reserved water rights."¹⁵

In response to the President's directive, Solicitor Krulitz briefly

8. Non-reserved Water Rights-United States Compliance with State Law, 88 Interior Dec. 1055 (1981).

9. 88 Interior Dec. at 1064.

10. *Id.*

11. Federal "Non-Reserved" Water Rights, Legal Memorandum, United States Dept. of Justice, Office of Legal Counsel (June 16, 1982) [hereinafter cited as Memorandum].

12. Memorandum at 4.

13. *Id.* at 6.

14. 86 Interior Dec. 553 (1979).

15. *Id.* at 562.

reviewed the reserved rights doctrine and undertook a complete inventory of the reserved water rights that could be asserted on federal land.¹⁶ In summary, he stated that reserved water rights have been judicially inferred where the Federal Government has set aside a reservation of land for a specific purpose but did not expressly reserve water to fulfill that purpose.¹⁷ The right has a priority date as of the date of the creation of the reservation.¹⁸ Compliance with state water law is not required.¹⁹ The amount of water reserved is the amount necessary to fulfill the purposes of the reservation on the date the reservation was created²⁰ whether or not the reservation made actual use of the water at that time.²¹ However, water is reserved only for the primary purposes of the reservation and water rights for secondary purposes must be acquired in some other manner.²²

The reserved water rights doctrine has been judicially defined through extensive litigation.²³ Although there remains a number of unanswered questions regarding actual quantification and jurisdiction, no objection could be made to Krulitz' brief summation of this concept in his opinion.

Solicitor Krulitz took the President's directive one step further, however, and set forth his legal analysis for the assertion of "non-reserved" federal water rights. It is this analysis that will be summarized here.

Krulitz first examined the ownership theory of federal water rights.

16. *Id.* at 571-74.

17. In the landmark decision, *Winters v. United States*, 207 U.S. 564 (1908), the United States, on behalf of the Fort Belknap Indian Reservation, sought to enjoin upstream appropriators from diverting water from the Milk River. The Treaty of May 1, 1888 had made no mention of water rights for the Indian Reservation. The Court held that "the power of the government to reserve the waters and exempt them from appropriations under state laws is not denied, and could not be. (citations omitted). That the government did reserve them we have decided, and for a use which would be necessarily continued through years." The Court reasoned that without water, the lands were "practically valueless" and that Congress could not have intended that result. *Id.* at 577.

18. *Arizona v. California*, 373 U.S. 546, 600 (1963). The Court determined that the United States had reserved the water for the Indians as it was obviously needed to effectuate the purpose of the reservation. However, a lower court has held that certain Indian reserved water rights have a priority date from time immemorial because the water was used for certain purposes long before a reservation was created. *United States v. Adair*, 478 F. Supp. 336 (1979).

19. *Winters*, 207 U.S. at 577.

20. *Cappaert v. United States*, 426 U.S. 128, 141 (1978). The Court used restrictive language in holding that only the minimum amount of water necessary to preserve the "pupfish" at Devil's Hole National Monument was reserved. The doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."

21. *Arizona v. California*, 373 U.S. at 600. The Court concluded that the implied water right was intended to satisfy future as well as present needs of the reservation.

22. *United States v. New Mexico*, 438 U.S. 696, 715 (1978). In determining reserved water rights for the Gila National Forest, the Supreme Court concluded that water was reserved for the primary purposes of the Forest when it was established but water was not reserved for the secondary purposes established later by the Multiple-Use Sustained-Yield Act of 1960.

23. 86 Interior Dec. at 571. The excerpt is a definition of reserved water rights taken from *Cappaert v. United States*, 426 U.S. at 138. See 86 Interior Dec. at 571 n. 19.

He asserted that originally, the United States obtained ownership of western lands from cessions by foreign nations and gained plenary power over these lands by virtue of the Property Clause.²⁴ Plenary power over federal lands includes the power to control the disposition and use of water related to such lands. Any interest in this land or water is derived from federal title and must be acquired by a congressional grant or disposition which will not be lightly inferred by the Courts.²⁵

Krulitz also found support for federal control over water rights in the Supremacy Clause,²⁶ which permits the United States to exercise control without compliance with state law, unless Congress clearly mandates that state regulations are to be followed.²⁷

Krulitz concluded that the United States continues to exercise control over federal land and water without regard to state law unless there is a clear congressional mandate providing for state control.²⁸

Next, Krulitz discussed congressional legislation that could provide for state control of water rights. He began this discussion by stating that enabling legislation providing for admission of a state into the Union is not a congressional mandate sufficient to divest the United States of control over federal land and water. By itself, the equal footing doctrine does not grant control of federal water to the states. Therefore, the states must look to other legislation for such a grant from Congress.²⁹

The Western states adopted the appropriation doctrine, developed from mining laws, which is a priority system of uses without regard to ownership of lands appurtenant to the water. In contrast, common law riparian rules originally applied to public lands. As a result, conflicts arose on public lands between federal patentees who claimed riparian water rights and prior appropriators who claimed water rights under state law.³⁰

Congress passed three statutes which resolved these conflicts "in favor

24. U.S. CONST. art. IV, § 3, cl. 2 provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

25. 86 Interior Dec. at 563.

26. U.S. CONST. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

27. 86 Interior Dec. at 564.

28. *Id.* at 563.

29. *Id.* at 564.

30. *Id.* at 565.

of prior appropriators”³¹ and provide the basis for state regulation of water rights on federal land. By the Mining Acts of 1866³² and 1870,³³ “Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent that water is appropriated by members of the public under state law.”³⁴ Krulitz concluded that, as a result of these acts, an assertion of federal water rights must be confined to unappropriated water on public lands.³⁵

The third act, the Desert Land Act of 1877,³⁶ is a homesteading act that granted large tracts of land to a person who irrigated and reclaimed the land. The Act provided water rights to the homesteader for those purposes and went on to state:

all the surplus water over and above such actual appropriation and use together with the water of all lakes, rivers, and other sources of supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.³⁷

Krulitz found several limitations in this excerpt and discussed the United States Supreme Court’s interpretation of the limitations.

The Supreme Court made it clear in *Federal Power Commission v. Oregon*³⁸ that the Act is limited to sources of water on the public lands and does not apply to federal “reservations.”³⁹ The Act is also limited to unused, unappropriated water. Therefore, the water the federal government was using in 1877 was not free for appropriation.⁴⁰

The Act does not address the question of how the federal government is to acquire water rights on public lands. Krulitz discussed a number of cases which held that private water users and patentees of public land must acquire water rights in accordance with state law but do not mention how the federal government is to acquire water rights.⁴¹

Krulitz relied on dictum in *United States v. Rio Grande Dam and*

31. *Id.*

32. Lode Mining Act of July 26, 1866, ch. 262, 14 Stat. 251 (current version at 30 U.S.C. § 51 (1976)).

33. Placer Mining Act of July 9, 1870, ch. 235, 16 Stat. 218 (current version at 30 U.S.C. § 52 (1976)).

34. 86 Interior Dec. at 565.

35. *Id.* at 565-66.

36. Desert Land Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (current version at 43 U.S.C. § 321 (1976)).

37. 43 U.S.C. § 321 (1976).

38. 349 U.S. 435 (1955).

39. 86 Interior Dec. at 567 (citing 349 U.S. at 488) (emphasis in opinion).

40. *Id.*

41. *Id.* at 568.

*Irrigation Co.*⁴² to support his contention that the federal government has the right to use unappropriated water for congressionally mandated beneficial uses without compliance with state law. In *Rio Grande*, the Court stated that the state legislatures could establish their own systems of water law but could not destroy (1) "the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of government property"; (2) the navigability of navigable streams.⁴³

He disagreed with the dictum in *California v. United States*,⁴⁴ where the Court said "that there are two limitations on the states' 'exclusive control of its streams—reserved rights. . . and the navigation servitude,' "⁴⁵ citing *Rio Grande*. Krulitz maintained that *Rio Grande* did not limit federal rights to the "higher reserved rights standard" but allowed federal rights "under a lesser standard of water necessary for the beneficial uses of government property."⁴⁶

Krulitz found the Supreme Court dicta "somewhat at war with one another" because the Desert Land Act was enacted to promote settlement of public lands and was directed at the public and not at the Federal Government. Nevertheless, he finally concluded that "the United States did not divest itself of its authority, as sovereign, to use *unappropriated* waters on the public lands for governmental purposes" by the Acts of 1866 and 1870 and the Desert Land Act.⁴⁷

As further support for his conclusion, Krulitz cited *United States v. New Mexico*,⁴⁸ in which the Court recognized federal reserved water rights. The Court said:

The Court has previously concluded that whatever powers the states acquired over their waters as a result of congressional acts and admission to the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes (citations omitted).⁴⁹

Krulitz argued further that it was easy to understand why Congress repeatedly provided that state law would govern acquisition of water rights. "In a constitutional context, this so-called 'express deference to

42. 174 U.S. 690 (1899).

43. 86 Interior Dec. at 565 (citing 174 U.S. at 703).

44. 438 U.S. 645 (1978).

45. 86 Interior Dec. at 568 (citing 438 U.S. at 662).

46. *Id.* at 569.

47. *Id.*

48. 438 U.S. 696 (1978).

49. 86 Interior Dec. at 570 (citing 438 U.S. at 698).

state water law' is essential to divest the United States of its inherent power and control over its property."⁵⁰ Furthermore, Congress is aware of this state-federal struggle over control of water and it has never enacted any law that requires the Federal Government to follow state law in every instance.⁵¹

Finding that the United States has not granted away its right to make use of unappropriated waters on federal land,⁵² Solicitor Krulitz next explained the necessity for and nature of the non-reserved water rights.

The Solicitor explained that federal agencies have always appropriated the water on the lands they administer to carry out various programs. This appropriation is "necessary to carry out the secondary uses for which many federal reservations are administered. It is also essential for the management and administration of non-reserved federal lands."⁵³

Krulitz maintained that the non-reserved federal water right arises for "congressionally-authorized uses."⁵⁴ The right begins with the actual use of the water, not by implication as a reserved water right does. The priority date of the non-reserved water right is "the date action is taken leading to actual use."⁵⁵ The United States may not interfere with other water rights that have a priority date under state law that is earlier in time to the United States' right.⁵⁶

Non-reserved water rights will usually be allowed under state water law but Krulitz found that federal appropriations "cannot be strictly limited by what state water law says is a 'diversion' of water or a 'beneficial use' for which water can be appropriated."⁵⁷ Only Congress, by authority of the Property Clause, may control the disposition and use of water on its land. Legislation passed by Congress regarding public lands preempts conflicting state legislation. "The United States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives."⁵⁸

The last question Krulitz addressed regarding non-reserved federal water rights was to what extent the federal government must comply with state water law in asserting its water rights. In *United States v. New Mexico*, the Supreme Court suggested in dictum that where there is not a reserved right "there arises the contrary inference that Congress in-

50. *Id.*

51. *Id.*

52. *Id.* at 571.

53. *Id.* at 574.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 575.

58. *Id.*

tended' federal agencies to 'acquire water in the same manner as any other public or private appropriator.'"⁵⁹ Krulitz stated: "It is not clear whether the Court was referring generally to the concept of appropriation of water used by the Western states, or full compliance with procedural and substantive state water law, or only compliance with state procedures."⁶⁰

Krulitz concluded that the Supreme Court could not have intended that the United States comply with state substantive law because a federal agency would have to vary land management policy "significantly" in different states to comply with the water laws of each state. He found it "reasonable to conclude" that non-reserved water rights are not "dependent upon state law in defining their substantive contours."⁶¹

Krulitz could not determine whether compliance with state procedural law was required but stated that such compliance had the advantages of putting other appropriators on notice and allowing "better integration of state and federal water rights."⁶² He concluded that the better policy would be to follow state procedural law "to the greatest practicable extent."⁶³ Nevertheless, this compliance with state law may not be required and "should not be construed as a waiver of any rights to use water."⁶⁴

Having concluded that the United States possesses non-reserved water rights, Krulitz inventoried which non-reserved water rights may be acquired by the various agencies within the Department of the Interior.⁶⁵

59. *Id.* at 576 (citing 438 U.S. at 702).

60. *Id.*

61. *Id.* at 576-77.

62. *Id.* at 577.

63. *Id.*

64. *Id.*

65. *Id.* at 612 to 616.

1. *Bureau of Land Management Non-Reserved Water Rights.*

The Taylor Grazing Act and FLPMA are the major statutes providing for management of public lands. These acts require appropriation of water to carry out the objectives established by Congress. Krulitz noted that his predecessors, specifically Solicitor White, held that the Bureau of Land Management (BLM) had the right to use unappropriated water to carry out objectives of the Taylor Grazing Act without compliance with state water law. Krulitz affirmed this holding although he did not agree with all of Solicitor White's comments. However, Krulitz restated the policy to comply with state law as much as possible. Similarly, Krulitz concluded that FLPMA required the appropriation of water to carry out the congressional objectives of the Act and that the United States was authorized to "appropriate unappropriated water available on the domain as of October 21, 1976, to meet the new management objectives dictated in the Act."

2. *Bureau of Reclamation Non-Reserved Water Rights.*

All non-reserved water rights must be appropriated in accordance with state law.

3. *National Park Service and Fish and Wildlife Service Non-Reserved Water Rights.*

"The National Park Service may appropriate water to fulfill any congressionally-authorized function for National Park System area" for consumptive and non-consumptive uses. The Fish and Wildlife Service non-reserved water rights are the same.

III. THE MARTZ OPINION

Following the release of the Krulitz Opinion, concerns were raised regarding the alleged federal non-reserved water rights. In response, the Secretary of the Department of the Interior decided not to implement some of the provisions of the Krulitz Opinion concerning non-reserved water rights except: "(i) when the agencies receive specific approval determined on a case-by-case basis, . . . , or (ii) when required to submit all claims for water rights in the course of litigation."⁶⁶ Uncertainty resulted within the Department of the Interior agencies regarding the steps to be taken to "identify, establish and quantify federal water rights" and the "legal basis and procedures to be used for assertion of non-reserved water rights."⁶⁷ Solicitor Martz, Krulitz' successor, issued a supplemental opinion on January 16, 1981 to "clear up uncertainties."⁶⁸

Martz categorized all federal water rights, as follows:

1. Federal reserved water rights.
2. "A water right initiated either (i) by application or other appropriative act prescribed by State law, or (ii) by the historic use of water on public lands for consumptive beneficial uses."
3. "A right to use such unappropriated water arising on the public lands of the United States as may be reasonably required for Federal purposes expressly or impliedly mandated by Act of Congress."
4. Water rights acquired by purchase, exchange, condemnation or gift.⁶⁹

These categories are all mentioned in the Krulitz Opinion but Martz separated federal appropriated water rights into two subparts, which facilitates understanding of the procedural directives to follow.⁷⁰

Martz stated that state procedural and substantive law are to be followed with two "limited" exceptions. One is "where water has been used historically by federal agencies for consumptive beneficial uses recognized by State law but without conforming" to the procedural requirements of state law. These uses are "small in quantity", "have been integrated into the regimen of water use and development in the watershed," and have been available for use "notwithstanding any past failure. . .to conform to procedures prescribed by state law."⁷¹

The second exception arises where the Federal Government asserts a

66. 88 Interior Dec. at 254.

67. *Id.*

68. *Id.*

69. *Id.* at 255.

70. *Id.*

71. *Id.*

water right that does not conform to substantive state law. The two exceptions are within the non-reserved water rights theory set out in the Krulitz Opinion.⁷²

Next, Martz articulated seven principles of non-reserved water rights. These are substantially similar to those set out in the Krulitz Opinion with the following additions:

6. Neither the *New Mexico* case nor any other case has precluded the exercise of a Federal right for failure in the past to meet the filing, permitting and other procedural requirements of State Law.

7. Whether a particular paramount Federal purpose is mandated by act of Congress rests on the reasonable interpretation of the Act and its legislative history.⁷³

The sixth addition is consistent with the new delineation by Martz of historical uses by the Federal Government without procedural compliance with state law. The seventh clarifies how federal agencies should interpret Congressional legislation on water rights.

In conclusion, Martz overruled the Krulitz determinations of non-reserved federal water rights under the Federal Land Policy Management Act (FLPMA) and the Taylor Grazing Act. He held that FLPMA does not authorize water uses outside of beneficial use concepts recognized by state law and, to the contrary § 701(g) of the Act⁷⁴ provides that state law regarding appropriation shall not be limited or restricted by the Act. He found that "the same analysis and conclusion is equally applicable to the Taylor Grazing Act."⁷⁵

IV. THE COLDIRON OPINION

The Solicitor's Office of the Department of the Interior came under a new administration in 1981, and with the new administration came new views on federal water rights:

There is great uncertainty concerning the practical application, if any, of the non-reserved rights theory by federal agencies. In particular, the asserted existence of this right has hampered the ability of the State and Federal Governments to quantify

72. *Id.* at 256.

73. *Id.* at 257.

74. Section 701(g), a savings provision in FLPMA, provides that:

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests or rights in water resource development or control;

See 43 U.S.C. § 1701 (1976).

75. 88 Interior Dec. at 257-58.

federal water rights and to negotiate agreements to determine the procedures and methods to be used in quantifying and adjudicating water rights. The assertion of non-reserved rights has also created a new and unnecessary cloud over private water rights dependent on water sources that are on, under, over or appurtenant to federal lands.⁷⁶

In light of these observations, the new Solicitor of the Department of the Interior, William H. Coldiron, felt it necessary to undertake a more comprehensive review of the concept of federal non-reserved water rights. On September 11, 1981 an opinion was issued by the Department of the Interior containing the results of this review.⁷⁷ Not too surprisingly, the conclusion was that "there is no federal 'non-reserved' water right."⁷⁸

Solicitor Coldiron's analysis of the non-reserved water right theory began with an examination of the interrelationship of federal and state control of water rights. The Solicitor acknowledged that Congress has the power under the Commerce and Property Clauses to control the disposition and use of water appurtenant to lands owned by the federal government and that under the Supremacy Clause, it is "unlikely that state law could preclude reasonable water use by a federal agency if Congress specifies a particular federal usage."⁷⁹ However, Congress may also defer to the states in control of water resources. Therefore, the ultimate issue, according to the Solicitor, is whether Congress intended to delegate the authority to regulate unappropriated water resources on public lands to the states.⁸⁰

Solicitor Coldiron analyzed the question of congressional intent in terms of the legislative history of various land use statutes affecting water rights. He concluded that the early statehood acts, the 1866 and 1871 Acts, the Desert Land Act, the Reclamation Act of 1902, and at least thirty-seven other public land use statutes reflect congressional recognition of the practical importance of local control of water resources and a general policy of deference to state water law.⁸¹ He also noted that "only in very limited instances has Congress maintained its power and not deferred to state law."⁸² One of the instances cited was *United States v. Rio Grande Dam and Irrigation Co.*,⁸³ where the United States Supreme Court upheld New Mexico's control of state water except to the extent that it interfered

76. Non-Reserved Water Rights-United States Compliance with State Law, 88 Interior Dec. 1055, 1065-57 (1981).

77. 88 Interior Dec. 1055.

78. *Id.* at 1064.

79. *Id.* at 1058.

80. *Id.*

81. *Id.* at 1059-60.

82. *Id.* at 1060.

83. 174 U.S. 690 (1899).

with the navigation servitude. The other exception recognized by the Solicitor was the reserved rights doctrine created by the Court in the case of *Winters v. United States*.⁸⁴

Nevertheless, the Solicitor believed that these cases are of relatively minor importance to the issue of federal non-reserved water rights as the issue was directly and definitively addressed by the Court in two 1978 cases, *United States v. New Mexico*⁸⁵ and *California v. United States*.⁸⁶ From similar language in both opinions the Solicitor concluded that Congress intended to give the states broad control over water resources which would be limited only where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude.⁸⁷ Therefore, in analyzing land management statutes, the presumption arises that "the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation."⁸⁸

Implicit in the Solicitor's final conclusion that "there is no federal 'non-reserved' water right"⁸⁹ is the assumption that none of the current land management statutes contain evidence of a congressional intent to retain the power of administration over the water resources on public lands which overcomes the presumption of deference to the states. Therefore, federal entities would be required to acquire water as would any other private claimant under state law.⁹⁰

V. THE DEPARTMENT OF JUSTICE MEMORANDUM

On March 6, 1980, suit was filed in the Fifth District Court of the State of Wyoming to determine the rights of the United States Department of Agriculture, through the Forest Service, to water in the Big Horn and Shoshone National Forests.⁹¹ Because the Forest Service was asserting claims based on the federal non-reserved water rights theory, Carol Dinkins, Assistant Attorney General for the Land and Natural Resources Division, asked the United States Department of Justice for a legal opinion concerning the federal government's legal rights to unappropriated waters on federally owned lands in the western states.⁹² In response to this request

84. 207 U.S. 564 (1908).

85. 438 U.S. 696 (1978).

86. 438 U.S. 645 (1978).

87. 88 Interior Dec. at 1064.

88. *Id.*

89. *Id.*

90. *Id.* at 1065.

91. In re the Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, Civ. No. 4493 (5th Jud. Dist. Wyo. Mar. 6, 1980).

92. Memorandum at 1.

and the continuing concern over the non-reserved rights theory, the Department issued a legal memorandum on June 17, 1982 containing a comprehensive analysis of the federal government's rights to unappropriated water on public lands.⁹³ The Department analyzed the issue of federal non-reserved water rights from both a constitutional basis and a statutory basis.

A. *Constitutional Basis for Federal Claims*

The analysis begins with the acknowledgment that Congress has the power under the United States Constitution to authorize the appropriation of unappropriated water by federal land management agencies and thereby preempt inconsistent state laws. Therefore, the question addressed by the analysis "is not generally whether Congress has the *power* to establish federal rights to unappropriated water, but whether it has exercised that power."⁹⁴

The Department asserted that all federal claims to water outside of state law rest on the same constitutional basis: The federal government is not precluded from asserting the existence of water rights outside of state law or the reserved rights doctrine. As it is stated in the memorandum, "[t]he fact that the Supreme Court has never explicitly recognized a non-reserved water right in *haec verba* does not mean that the Court would not recognize the federal government's implied right to unappropriated water, arising from clear congressional intent, in a situation that has not yet been presented to it."⁹⁵

According to the Department of Justice, some of the confusion about the federal government's right to unappropriated water in the western states arises from arguments based on "ownership" of the unappropriated water. In the memorandum, it is argued that Solicitor Krulitz's assertion of a broad federal non-reserved water right rested in part upon the assumption that the United States acquired a proprietary interest in all unappropriated water on public lands at the time it acquired the territories that became the western states, and that it never subsequently granted away the proprietary interest. Thus, if the United States "owns" the water, "it may be contended that all that is necessary to perfect its rights is use of that water for an authorized federal purpose; a state cannot impose any restriction on that use unless Congress had explicitly granted an ownership interest to the states."⁹⁶ However, if the statehood acts and the federal land acts of the 1860's and 1870's gave ownership to the states of all

93. Memorandum.

94. *Id.* at 47-48.

95. *Id.* at 50.

96. *Id.* at 51-52.

unappropriated water within their borders, then to acquire water rights in such water the federal government must withdraw certain lands from the scope of the acts, acquire the rights through purchase, exchange or condemnation, or appropriate the water under state law.⁹⁷

The Department asserted, however, that neither theory can be used to adequately deny or prove the existence of federal non-reserved water rights. Furthermore, either theory presents problems concerning the constitutionality of the reserved rights doctrine. According to the memorandum,

. . .if Congress, either by statehood acts or land management statutes, gave the states ownership of all unappropriated waters on the public domain, on what basis can the federal government reserve some of the water for a federal use, without compensation, by a withdrawal of land made after ownership of the waters passed on to the states? On the other hand, with respect to federal claims, the Supreme Court has clearly limited the reserved rights that the United States can assert to those which are minimally necessary to fulfill the explicit or necessarily implied congressional intent, and has recognized that the United States will not, in every instance have reserved rights to all unappropriated water on federal reserved lands. If the United States owned all the unappropriated water on the public domain at the time a particular parcel was reserved and had plenary control over its disposition, this limitation would appear to be superfluous, and the Court's extended analysis of the scope of the reserved right doctrine unnecessary.⁹⁸

The Department concluded that the claims of ownership of natural resources by the states or by the federal government are actually claims of regulatory authority over unappropriated water on public lands. Therefore, the right to unappropriated water on federal lands should be analyzed in terms of competing regulatory jurisdiction rather than competing ownership.⁹⁹

To this end, the Department examined the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. Recognizing that Congress has the power to cede its constitutional authority over federal uses of unappropriated water on federal lands to the states, the Department looked to see whether the Mining Acts or the Desert Land Act divested the government of that authority.¹⁰⁰

97. *Id.* at 52-53.

98. *Id.* at 53-54.

99. *Id.* at 54-56.

100. *Id.* at 56.

The Supreme Court's treatment of these acts has been, in the view of the Department, "ambiguous and far from definitive."¹⁰¹ Although language from some of the opinions concerning these acts could be construed as vesting authority over unappropriated water in the states, "the sounder view is that the Mining Acts and Desert Land Act authorize state control only over appropriations by private individuals of unappropriated water on federal lands and do not, by their terms, cede to the states' control over the federal government's use of water for federal purposes and programs."¹⁰²

This belief is based on language from the *Pelton Dam*¹⁰³ decision and *Cappaert v. United States*¹⁰⁴ relating state control over water resources to private appropriators. It is consistent with the legislative history and background of the acts suggesting that the primary purpose of the water rights provisions was to clarify that private patentees or users of federal lands would not acquire rights to unappropriated water except as recognized by state law.¹⁰⁵

B. *Statutory Basis for Federal Claims*

Although the Department of Justice concluded that Congress did not cede its regulatory authority over federal use of unappropriated water on federal lands to the western states by the Mining Acts and the Desert Land Act, the Department recognized that Congress, through those acts and subsequent land acts, acknowledged the development of comprehensive state water codes and administrative systems applicable to unappropriated water on federal, as well as privately owned land. Therefore the issue that had to be addressed was when and how federal statutory law displaces state water law.¹⁰⁶ Did Congress, by authorizing certain uses of federal lands, also intend to authorize the acquisition of water for those uses without regard to limitations imposed by state law?¹⁰⁷

The Department believed that under the federal non-reserved rights theory propounded by Solicitor Krulitz, the requisite intent to displace control over the appropriation of unappropriated water could be inferred merely from Congress' authorization to federal agencies to manage federal lands; no specific congressional intent to displace state control over water need be shown. On the other hand, the states had argued that unless Congress has set specific conditions on the acquisition or use of water by

101. *Id.* at 57.

102. *Id.* at 58.

103. *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

104. *Cappaert v. United States*, 426 U.S. 128 (1976).

105. Memorandum at 58.

106. *Id.* at 61.

107. *Id.* at 63-64.

federal agencies or has reserved the underlying land, federal agencies are limited to water rights obtainable under state substantive and procedural law.¹⁰⁸

The Department recognized that the Supreme Court decisions in *California v. United States* and *United States v. New Mexico* are relevant to an analysis of the federal rights theory, but it also believed that both critics and proponents of the federal non-reserved rights theory have focused on isolated language in both cases that do not provide an entirely satisfactory rationale for either conclusion.¹⁰⁹

According to the Department of Justice, critics of the non-reserved right point to three passages from *California* and *New Mexico* that they feel completely dispose of any contention that any federal non-reserved water rights exist:¹¹⁰

The Court noted that there are two limitations to the State's exclusive control of its streams—reserved rights so far at least as may be necessary for the beneficial uses of the government property, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.¹¹¹

Where water is only valuable for a secondary use of the reservation. . .there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.¹¹²

[T]he 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas.¹¹³

The Justice Department noted, however, that these passages must be read in context. For example, in the language quoted from *California* the Court was merely characterizing its holding in the *Rio Grande* case. In the remainder of the opinion the Court recognized that there may be other circumstances under which a federal statute would preempt the state's exclusive control of its streams.¹¹⁴

108. *Id.* at 64.

109. *Id.*

110. *Id.* at 65.

111. *California v. United States*, 438 U.S. at 662.

112. *United States v. New Mexico*, 438 U.S. at 702.

113. *Id.* at 715.

114. Memorandum at 66.

Likewise, the often cited language in *New Mexico* that the United States must acquire water "in the same manner as any other public or private appropriator" must be considered in context. Because the only issue before the Court in *New Mexico* was the scope of the Forest Service's reserved rights, the Court's statement was made only in the context of federal reserved lands.¹¹⁵

Finally, the Court's reference in *New Mexico* to the reserved rights doctrine as an exception to Congress' policy of deference to state water law "does not imply that reserved rights are the *only* exception."¹¹⁶

On the other hand, the opinions cannot be read as narrowly as the proponents of the non-reserved theory would like. Solicitor Krulitz, for example, argued that when the Court in *New Mexico* stated that federal agencies must acquire water for secondary uses "in the same manner" as other appropriators, it only meant that the right must be acquired through "appropriation" rather than by "reservation" of the land. The Department of Justice, however, found that on these occasions the Court referred expressly to congressional intent that water be acquired under state law.¹¹⁷ Therefore "the most logical reading of the Court's language is that water that is not necessary to carry out the particular primary purposes mandated by Congress for the federal reservation in question must be acquired in compliance with applicable state substantive and procedural law."¹¹⁸

Solicitor Krulitz also argued that because state law must fall if "inconsistent" with congressional directives, federal non-reserved water rights must be recognized. The Department, however, concluded that the Court in *California* contemplated that "inconsistent" state conditions would only include those that would conflict with explicit statutory provisions concerning use of water that would entirely frustrate the major purposes of a federal project. This does not preclude the state from imposing conditions on secondary or incidental features of a federal project.¹¹⁹

According to the Department, "the primary importance of the Court's decisions in *California* and *New Mexico* to the federal non-reserved rights theory lies in the Court's mode of analysis, particularly in the significance attributed by the Court to Congress' history of deference to state water law."¹²⁰ The effect of this deference is the creation of a

115. *Id.* at 67.

116. *Id.*

117. *Id.* at 68-69.

118. *Id.* at 69.

119. *Id.* at 69-70.

120. *Id.* at 70.

presumption that, in the absence of evidence to the contrary, Congress intended federal agencies to acquire water rights in accordance with state law.¹²¹

The Department also found the recent United States Supreme Court decision of *United States v. Kimball Foods, Inc.*¹²² to be helpful. In that case, the Court considered whether contractual liens arising from certain loan programs take precedence over private liens established under state commercial laws. The Court recognized that federal law governed the rights of the United States arising under the loan programs but held that application of federal law does not require the creation of a uniform federal rule in all cases, and therefore the priorities should be determined under state law.¹²³

The Department argued that the significance attributed by the Court in *Kimball* to the expressions of a congressional policy of deference to the states and the unwillingness of the Court to create federal rules of priority absent a showing that application of state rules will frustrate specific federal interests echoes the reasoning of the Court in both *California* and *New Mexico*. Therefore, the teaching point of *Kimball*, *California* and *New Mexico* is that state law may control federal rights and liabilities arising under federal programs where "the application of state law will not frustrate specific federal purposes or interests, where the federal program has been and can be adapted to state law, and where implication of federal rights would substantially disrupt expectations of private individuals based upon an existing comprehensive state regulatory scheme."¹²⁴

The next step of the analysis, according to the Department, was to determine whether Congress intended to carve out an exception to its general policy of deference to state law in any of the various land management acts. The Department believed that *California* and *New Mexico* "limit the bases upon which federal water rights may be asserted without regard to state law to specific congressional directives or authorizations that override inconsistent state law and the establishment of primary purposes for the management of federal lands or construction and operation of federal projects that would be frustrated by the application of state law."¹²⁵

The Department also asserted that the Court's discussion in *New Mexico* of primary purposes and secondary uses is not necessarily limited to federal lands that have been formally withdrawn from the public

121. *Id.* at 72.

122. 440 U.S. 715 (1979).

123. *Id.* at 726, 728.

124. Memorandum at 76.

125. *Id.*

domain, but could be applied equally as well to "acquired" lands that have been set aside for specific federal purposes.¹²⁶ Similarly, the Department argued that "Congress could establish 'primary purposes' for the management of public domain lands that could be the basis for federal water rights."¹²⁷ If Congress specified particular purposes for which the lands should be maintained and managed with the implicit intent that water be available for those purposes, then there would be a solid basis for the assertion of a federal non-reserved water right.¹²⁸

In its conclusion, the Department stated that federal non-reserved water rights cannot be created merely by the assignment of land management functions to a federal agency as suggested by Solicitor Krulitz. The federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by necessary implication; otherwise, the presumption is that the western states retain control over the allocation of unappropriated water within their borders.¹²⁹

VI. CONCLUSION

The next logical step is for the agencies with responsibility for enforcement and administration of the various land management statutes to review their statutory authority and water needs and make an initial determination as to whether a basis exists for asserting federal non-reserved water rights as envisioned by the Department of Justice. Congressional intent to preempt state control over unappropriated water in the western states could be inferred where the conditions imposed under state law on the use or disposition of water by a federal agency conflict with specific statutory directives authorizing a federal project or directing the use of federal lands, or if application of state law would prevent the federal agency from accomplishing specific purposes mandated by Congress for the federal lands.

Although the Department of Justice admits that it has not undertaken an independent analysis of the various land management statutes, it doubts that the agencies will find the intent needed for the assertion of non-reserved federal water rights within those statutes. This does not mean that the federal government is powerless to assert such a right in the future. The Department of Justice made it clear that the choice is up to Congress. Because Congress has the power under the United States Constitution to supercede state law, Congress has the power to create federal non-reserved

126. *Id.* at 77-78. An example would be national forest lands acquired under the provisions of the Weeks Act, 16 U.S.C. § 515 (1976).

127. *Id.* at 79.

128. *Id.*

129. *Id.*

water rights. The only requirement is that Congress indicate either by clear expression or by implication that such rights are to be vested in the federal government.

The Department of Justice's analysis of the federal non-reserved water rights issue is the better-reasoned and more correct analysis of the issue. However, because the Department addressed only the legal issues raised by the federal non-reserved water rights theory, some doubt may remain as to the application of the legal principles outlined by the Department to specific factual situations. The final resolution of the federal non-reserved water rights theory may have to await careful and comprehensive adjudications by the courts in each of the western states.